BEFORE THE

SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

TESTIMONY OF THE HONORABLE ROBERT B. NELSON
COMMISSIONER, MICHIGAN PUBLIC SERVICE COMMISSION
&
CO-VICE CHAIRMAN, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS' COMMITTEE ON TELECOMMUNICATIONS

ON

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Mr. Chairman and members of the Committee, I am Robert B. Nelson, Commissioner of the Michigan Public Service Commission and co-Vice Chairman of the Telecommunications Committee of the National Association of Regulatory Utility Commissioners (NARUC). I would like to thank you for providing me the opportunity to testify today on behalf NARUC. I will focus my remarks on the status of local competition in Michigan and my thoughts on how best to foster competition and investment in broadband infrastructure in Michigan and elsewhere. I will also discuss specifically NARUC's positions on several proposed congressional initiatives regarding broadband and competition and some related initiatives pending before the FCC.

I would like to start by highlighting some basic facts: local telephone competition is much stronger in the service territory of one Regional Bell Operating Company (RBOC) serving Michigan, SBC Ameritech, than it is in the service territory of another, Verizon. The strength of local competition

in the SBC Ameritech region is due, in large part, to the tools given to our Commission by the 1996 Federal Telecommunications Act (1996 Act) and by our State legislature. The anemic condition of local competition in Verizon's Michigan territory is, in my opinion, due in part to the fact that Verizon is not subject to the market opening requirements of Section 271 of the 1996 Act in my State.

I believe the approach of the Breaux/Nickles bill contain provisions that are similar to several related proposals currently pending before the FCC. This approach to broadband deployment could well undermine several of the provisions of the 1996 Act, which we have used to open markets throughout the State of Michigan to benefit consumers. I am not alone. NARUC is on record opposing Breaux/Nickles and has filed comments at the FCC detailing the Association's concerns about the tentative conclusions in the related FCC proceedings.

Our Commission recently released a report to our Governor and Legislature entitled "Report on the Status of Competition in Telecommunication Service in Michigan." The report, which is attached to my testimony, indicates that for calendar year ending December 31, 2001, 12.8% of the access lines in Michigan were served by competitive local exchange carriers (CLECs). This is a significant increase in the number of access lines provided by CLECs at year-end 2000, when 6.5% of the lines were provided by CLECs and year-end 1999, when only 4% of the access lines were provided by CLECs. The report also concludes that CLEC market share is approximately 17% of Ameritech lines. Although not detailed in the report, our staff investigation reveals that less than 1% of the Verizon service area lines are served by CLECs. The vast difference between the percentage of Ameritech lines

provided by CLECs and Verizon lines is due in my view, in large part to the fact that Ameritech has been attempting to secure approval for long distance authority in Michigan pursuant to Section 271 of the 1996 Act and Verizon, because they purchased the facilities of GTE, has not had to do so. Our experience demonstrates that the 1996 Act is working in Michigan!

Moreover, the Michigan report reveals that of the 896,023 access lines served by CLECs at year-end 2001, almost half, or 411,404 lines were served via the unbundled network element platform (UNE-P). An additional 213,585 lines were served by unbundled network facilities. Service via UNE-P or unbundled network facilities, which account for nearly 70% of the CLEC access lines served in Michigan, are a direct result of the Michigan commission's implementation of the provisions of the 1996 Act which require RBOCs to provide to CLECs nondiscriminatory access to unbundled network elements. (See, e.g., 47 U.S.C. § 251(c)(3)).

The UNE-P rates that we have adopted in Michigan are based on TELRIC cost models and are among the lowest in the nation. The results are impressive. In a resolution passed this February, NARUC also endorsed the concept of UNE-P as a viable business model for market entry. NARUC's position is based on the principle that one form of entry should not be favored over another.

A majority of States, including Michigan, have utilized Sections 251 and 252 of the 1996 Act to assure UNE-P is a realistic option for market entry. Any congressional or FCC initiatives that ultimately limit the State's ability to facilitate UNE-P would, in my view, undo all the progress we have made to

create local competition.

Specific legislation introduced this Congress will hinder the ability of States to ensure that the public switched network is irreversibly open. Both the Tauzin/Dingell bill (HR 1542) and the Breaux/Nickles bill (S. 2430) allow RBOCs to circumvent the market-opening requirements of the 1996 Act. HR 1542 exempts DSL services from the requirement that all local telecommunications services provided by an RBOC, including DSL services, be considered in determining whether the RBOC has met the 14 point checklist in Section 271, even though data services are an increasing part of the telecommunications services provided by RBOCs. S. 2430 would effectively remove all State commission authority to ensure there is non-discriminatory access to the public switched telephone network, currently required by § 251 of the 1996 Act.

Both bills incorrectly assume that voice and Internet traffic can easily be distinguished and, as a result, the underlying facilities can be regulated differently. The reality is that both voice and data traffic travel over the wire-line network in the same form, i.e., in packets of ones and zeros. They are indistinguishable. Eliminating State oversight of the facilities that carry both voice and data traffic raises a host of cost allocation and universal service issues that will take years to sort out.

I am also concerned by the approach of several proposed rulemakings currently pending before the FCC because I believe they could also undercut State efforts to implement the 1996 Act. The FCC's NPRM on wireline broadband services tentatively concludes that broadband services offered by

telecommunications companies are not "telecommunications services" and therefore should not be subject to the market-opening requirements of the 1996 Act. This, and related proposals re-examining the rules for what network functionalities should be unbundled and available to competitors, seek to promote broadband deployment by minimizing the regulation of DSL and other Internet platforms. This is a laudable goal. New broadband investment should not be subject to the same degree of regulation as the existing network. However, in pursuit of this goal, the FCC's wire-line broadband services rulemaking threatens to erode the line-sharing requirements for the existing network designed to allow multiple providers to compete. It is ironic that in the wake of the recent U.S. Supreme Court opinion in *Verizon v. FCC*, which upheld the FCC's rules that require RBOCs to combine unbundled network elements for competitors, and the methodology for pricing those elements, that there should be any consideration of backtracking on a method of entry (UNE-P) envisioned by the 1996 Act, even as it relates to advanced services. The FCC has been vindicated in its implementation of the 1996 Act and it should use the tools Congress has given it to promote competition. It should not remove advanced services from the list of services that Congress so wisely found to be subject to network-opening requirements in 1996.

We are at a critical stage in our efforts to implement real competition in the residential telephone and broadband markets in both rural and urban communities. We are currently faced with a choice of whether we want to stay the course and enforce the non-discriminatory access provisions of the Act or endorse proposals that undo those provisions for the benefit one set of dominant providers.

The competitive industry is struggling today, in part because it has been denied access to network facilities and has struggled to remain an attractive investment opportunity to financial analysts and institutional investors. Federal broadband policy should not enhance the market power of incumbent carriers.

In the broadband market in particular, the bankruptcy filings of Covad, Northpoint, Rhythms and countless others have contributed to the modest levels of broadband DSL take rates that we are witnessing today. I believe DSL penetration can indeed keep apace with and could even surpass cable modem subscribership if incumbent carriers are willing to take certain steps to boost demand. Incumbent carriers have long argued that it's too costly to make the necessary investments in the network to deploy fiber from the remote terminal to the home. If the deployment barrier is cost, Congress has responded accordingly with the recently enacted farm bill, which provides up to $750 million in loans for broadband investment. Many of you on this committee worked hard to make the broadband section in the farm bill become a reality and on behalf of NARUC, we applaud your efforts.

In addition, the Chairman of this committee, along with many of you introduced legislation a couple of weeks ago that would authorize the use of technology-neutral loans, grants, tax credits and pilot projects to stimulate investment and demand in broadband services. NARUC supports this particular approach to broadband deployment and has advocated the merits of this method for the last three years as per our resolution, which is attached. We do not believe that Congress or the FCC will achieve the desired goal of stimulating demand for broadband services through State preemption or

deregulation of bottleneck facilities, but rather through creative policy proposals like S. 2448, sponsored by Senator Hollings.

Furthermore, promoting multiple competitors in the broadband market will also drive down the price of broadband and make it more affordable to millions of Americans. In Michigan, we have recently enacted comprehensive legislation, which, among other things, creates a financing authority that will make low-interest loans to private and public entities for backbone and last-mile solutions and everything in between. Multiple providers will not only reduce the cost of telecommunications services and spur innovation; they will enhance the security of our networks by building in needed redundancies.

States have made great strides, pursuant to the 1996 Act, to enhance competition and deploy advanced services. Although progress has been uneven, it has been steady, as evidenced by the competitive landscape in Michigan and other States like New York, Texas, and Georgia. We should not respond to the statements issued by those who were ordered by Congress in 1996 to open their systems that doing so will threaten our nation's economic and national security. Congress should continue to have faith in the market-opening tools it crafted 1996 and give deference to the wisdom of the Supreme Court in affirming the States role in setting the rates and terms for access to the network. The evidence in Michigan indicates that vigorous enforcement of Section 251 and 271 of the 1996 Act stimulates investment in broadband across all platforms and reduces prices for consumers.

Resolution Supporting Legislative Proposals That Encourage the Deployment of Broadband Technologies and Advanced Services

WHEREAS, The deployment of infrastructure to provide broadband deployment has become a concern for several states and consumers; and

WHEREAS, Several bills have been introduced in the House and Senate that seek to encourage deployment of advanced services. While NARUC has opposed S 877 and HR 2420 and similar bills, other proposals seek to address the issue of ensuring that markets remain open to competition pursuant to the 1996 Act; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners ("NARUC"), convened at its Summer Meeting in Los Angeles, California, supports legislation that would encourage the deployment of broadband technology and advanced services to underserved areas (areas without affordable broadband deployment) without removing RBOC incentives to meet Section 271 requirements; *and be it further*

RESOLVED, Any legislative proposal promoting the deployment of broadband technologies and advanced services to rural and underserved areas should consider the following concepts:

- low-interest, technology and carrier neutral loans to those seeking to deploy broadband services to rural and under served communities;

- additional financial incentives, such as tax credits, to carriers that are deploying advanced services where existing incentives and support, including high cost loop support, are inadequate;

- effective enforcement tools to ensure that carriers meet their obligations with respect to broadband deployment; *and be it further*

RESOLVED, Legislation should keep intact the market-opening requirements contained in the 1996 Act.

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Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors July 26, 2000

Resolution Concerning the States' Ability to Add to the National Minimum List of Network Elements

WHEREAS, The States have traditionally provided the leadership needed to advance local competition and have evaluated a variety of approaches; *and*

WHEREAS, The Federal Communications Commission (FCC) has previously recognized the important contribution of State Commissions to local competition, expressing its intention to "…foster an interactive process by which a number of policies consistent with the 1996 Act are generated by the States" which may then be incorporated into national minimum requirements; *and*

WHEREAS, The FCC has initiated a triennial review of which network elements shall be included in the national minimum list of unbundled network elements ("UNEs") on a going-forward basis; *and*

WHEREAS, The level of local competition in each State is directly affected by which UNEs are available in that State; *and*

WHEREAS, The analysis to determine which network elements should be unbundled in a State is fact specific and must consider conditions in each particular State; *and*

WHEREAS, The State Commissions are in a better position to consider other factors, including the level of competition presumed by that State's system of retail price regulation; *and now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its February 2002 Winter Meetings in Washington, D.C., urges the FCC to recognize that States may continue to require additional unbundling to that required by the FCC's national minimum; *and be it further*

RESOLVED, That such additional unbundling is consistent with the purposes of the federal Telecommunications Act of 1996, and in accordance with State or federal law; *and be it further*

RESOLVED, That the NARUC General Counsel be directed to provide the FCC comments consistent with this resolution.

Sponsored by the Committee on Telecommunications.
Adopted by the NARUC Board of Directors February 13, 2002